

# Benign accommodation? *Ukuthwala*, 'forced marriage' and the South African Children's Act

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## 1. Introduction

The practice of *ukuthwala* in South Africa has recently received negative publicity, with numerous complaints being recorded. In the first and second quarter of 2009, the media reported that 'more than 20 Eastern Cape girls are forced to drop out of school every month to follow the traditional custom of *ukuthwala* (forced marriage)'<sup>1</sup>. Girls as young as 12 years are forced to marry older men, in some cases with the consent of their parents or guardians. Commenting on the matter, Congress of Traditional Leaders of South Africa (Contralesa) chairman, Chief Mwelo Nokonyana, said *ukuthwala* was 'an old custom that was now being wrongly practised in several parts of the eastern Transkei.'<sup>2</sup> Dr Nokuzola Mdele of the Camagwini Institute also stated 'that abducting a girl of 12 or 13 is not the cultural practice we know. This is not *ukuthwala*, this is child abuse. At 12, the child is not ready to be a wife.'<sup>3</sup> At the SA Law Reform Commission 'Roundtable Discussion on the practice of *Ukuthwala*',<sup>4</sup> which was held as part of its preliminary investigation to determine whether the proposal should be included in the Commission's law reform programme and in an effort to gather information on the subject, it was observed that *ukuthwala*, like many other customary institutions, has changed radically. The practice has now taken on other dimensions, including young girls forcibly being married to older men, relatives of the girl kidnapping and taking the girls themselves as wives, and abductions not being reported to the Traditional Authorities.<sup>5</sup>

These changed practices around *ukuthwala* potentially

increase the vulnerability of children's' rights violations. The main aim of this article is to evaluate the implications of the Children's Act 38 of 2005 for *ukuthwala*. Insofar as the recent media comments are pertinent to some of the conclusions reached in this article, a preliminary discussion of *ukuthwala* in its differing dimensions is important. For that reason in the second part of this article we trace the history of *ukuthwala*, and the traditional reasons for, and the different forms of, *ukuthwala*. We further discuss the procedure of *ukuthwala* and the legal position of the practice under customary law. In the third part, we will contextualise the debate of *ukuthwala* within the constitutional and international rights to culture and equality paradigms. In the fourth part, we proceed by looking at the framework for the consideration of culture and custom in the Children's Act before discussing the implications of the Children's Act for *ukuthwala*. The last part contains some conclusions.

## 2. *Ukuthwala*

### 2.1 What is *ukuthwala*?

In South Africa, the custom originated from the Xhosa.<sup>6</sup> However, although the custom is predominantly practiced among Xhosa-speaking tribes,<sup>7</sup> the practice has expanded into different ethnic groups. For example, the Mpondo clan has adopted *ukuthwala* from Xhosa clans such as the Mfengus.<sup>8</sup> Young Sotho men, through contact with other tribes, have also adopted the practice which was otherwise foreign amongst them.<sup>9</sup> *Ukuthwala* in

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<sup>1</sup> *The Herald* 6 April 2009; *Sunday Times* 31 May 2009, 3.

<sup>2</sup> *The Herald* 6 April 2009.

<sup>3</sup> *The Herald* 6 April 2009.

<sup>4</sup> Convened on 30 November 2009. Dr Mwambene attended this forum and copies of the papers presented are on file.

<sup>5</sup> Adv Ntsebeza 'Background to the investigation of *Ukuthwala*' presented at the SA Law Reform Commission (n 5 above).

<sup>6</sup> M Ngcobo 'Presentation to the Portfolio Committee on the Role of the Department of Social Development on *Ukuthwala*', 15 September 2009.

<sup>7</sup> JC Bekker, C Rautenbach and NMI Goolam *Introduction to Legal Pluralism in South Africa* (2006), 31.

<sup>8</sup> Ngcobo (n 6 above).

<sup>9</sup> JC Bekker *Customary Law in Southern Africa* (1989), 98.

South Africa enjoys popular support in the areas where it is still practiced.<sup>10</sup> According to a newspaper report, one Chief (a woman) in the region where *ukuthwala* is practiced said that the young girls who escape from the houses where they are detained whilst awaiting marriage were 'embarrassing our village'.<sup>11</sup>

The word *Ukuthwala* means 'to carry'.<sup>12</sup> It is a culturally legitimated abduction of a woman whereby, preliminary to a customary marriage,<sup>13</sup> a young man will forcibly take a girl to his home.<sup>14</sup> Some authors have described *ukuthwala* as the act of 'stealing the bride'.<sup>15</sup> *Ukuthwala* has also been described as a mock abduction or irregular proposal<sup>16</sup> aimed at achieving a customary marriage.<sup>17</sup> From these definitions, we see that *ukuthwala* is in itself not a customary marriage or an engagement. The main aim of *ukuthwala* is to force the girl's family to **enter into negotiations** for the conclusion of a customary marriage.<sup>18</sup> (Emphasis added).

The procedure for *ukuthwala* is as follows: The intending bridegroom, with the help of the one or two friends, will waylay the intended bride in the neighbourhood of her own home, quite often late in the day.<sup>19</sup> They will then 'forcibly' take her to the young man's home. Sometimes the girl is caught unawares, but in many instances she is caught according to prior plan and agreement. In either case, the girl will put up a show of resistance to suggest to onlookers that it is against her will, when in fact, it is seldom so. As Bekker explains: 'The girl, to appear unwilling and to preserve her maidenly dignity, will usually put up strenuous but pretended resistance, for,

more often than not, she is a willing party'.<sup>20</sup> Once the girl has been taken to the man's village, her guardian or his messenger will then follow up on the same day or the next day and possibly take her back if one or more cattle are not handed to him as an earnest promise for a future marriage.<sup>21</sup> Consequently, if the guardian does not follow her up to take her back, tacit consent to the marriage at customary law can be assumed.

After the girl has been carried to the man's family hearth, negotiations for *lobolo* between the families of the bride and the groom would then follow. If the families cannot reach an agreement, the girl will return to her parental home, while the man's family will be liable for damages.<sup>22</sup>

As noted, the main aim of *ukuthwala* is to force the girl's family to enter into negotiations for the conclusion of a customary marriage. It follows, therefore, that if a man abducts a girl but fails to offer marriage, or if he does offer marriage but is deemed by the girl's guardian to be unacceptable as a suitor, a fine of one beast is payable to the girl's guardian,<sup>23</sup> who, with his daughter, is said to have been insulted by the *thwala* without a consequent offer of a marriage, or having been *thwala'd* by the undesirable suitor.<sup>24</sup>

It is important to note that during the process of *ukuthwala*, it is contrary to custom to seduce a girl.<sup>25</sup> By custom, the suitor, after forcibly taking the girl to his home village, is required to report the *thwala* to his family head. The family head thereupon gives the girl into the care of the women of his family home, and sends a report to the

<sup>10</sup> The prevalence of the custom nowadays can be depicted from what Koyana and Bekker (n 14 above) 139, note: 'from enquiries that we made and on the basis of our own observations we rest assured that the *thwala* custom is still widely practised in Nguni communities.'

<sup>11</sup> This was a response to a report in the *Sunday Times* 31 May, 2009, 3 that the current practice of *ukuthwala* also takes the form of detaining these girls against their will in guarded huts and forced to have sex with their 'husbands'. They allegedly get beaten and humiliated should they try to escape.

<sup>12</sup> DS Koyana *Customary law in a changing society* (1980), 1.

<sup>13</sup> A customary marriage is a relationship which concerns not only the husband and wife, but also the family groups to which they belonged before the marriage.

<sup>14</sup> Koyana (n 12 above)

<sup>15</sup> E Curran and E Bonthuys 'Customary law and domestic violence in rural South African communities' (2005) *South African Journal on Human Rights*, 607, 615

<sup>16</sup> It should be noted that 'irregular' did not mean 'unlawful'.

<sup>17</sup> TW Bennett *Customary Law in South Africa* (2004), 212

<sup>18</sup> JC Bekker, C Rautenbach and NMI Goolam *Introduction to Legal Pluralism in South Africa* (2006) 31. It should, however, be observed that *ukuthwala* can be distinguished from the common law abduction. At common law, the crime of abduction has been described as the unlawful removal of a minor from the control of his or guardian with the intention of violating the guardian's potestas and of enabling somebody to marry her or have sexual intercourse with her. On the other hand, *ukuthwala* is lawful in the society that designed it; there is no *ukuthwala* of males; and lastly, the purpose of *ukuthwala* is to negotiate a marriage, not conclude it, and sexual intercourse is customarily not the intention.

<sup>19</sup> Bekker (note 9 above), 98; DS Koyana and JC Bekker 'The Indomitable Ukuthwala Custom' (2007) *De Jure* 139.

<sup>20</sup> Bekker (n 9 above) 98.

<sup>21</sup> Bekker (n 9 above) 98.

<sup>22</sup> E Curran and E Bonthuys, 'Customary Law and Domestic Violence in rural South African Communities' Research Report for the Centre for the Study of Violence and Reconciliation, (2004) 615.

<sup>23</sup> Mostly, among the *Pondo*, the *Fengu* and the *Bhaca*, and possibly other Cape tribes.

<sup>24</sup> Bekker (n 9 above) 98.

<sup>25</sup> Bekker (n 9 above) 98.

girl's guardian. A man who seduces a *thwala'd* girl is required to pay a seduction beast in addition to the number of *lobolo* cattle agreed upon and in addition to the *thwala* beast where no marriage has been proposed.<sup>26</sup> Other safeguards that were put in place for the protection of the *thwala* and the girl involved were that the parents of the girl were immediately notified after the *thwala* had occurred; if the *thwala* had not worked, a beast was supposed to be paid; and finally if a girl fell pregnant consequent upon her seduction, then further additional penalties were also supposed to be paid.<sup>27</sup>

Numerous reasons exist for the practice of *ukuthwala*, some of which are arguably cogent and weighty. They include: to force the father of the girl to give his consent;<sup>28</sup> to avoid the expense of the wedding; to hasten matters if the woman is pregnant; to persuade the woman of the seriousness of the suitor's intent; and to avoid the need to pay an immediate *lobolo* where the suitor and his or her family were unable to afford the bridewealth. From these reasons, it is apparent that *ukuthwala* can serve important cultural purposes in those South African communities which live their lives accordingly to cultural norms. However, these reasons are also suggestive of the fact that the girl or the unmarried woman involved is, in some cases, *thwala'd* without her consent. This provides the link to forced marriage, which then calls into play constitutional and human rights standards. In addition, insofar as the girl who is *thwala'd* may be aged below 18, issues related to child marriage and early marriage arise which in turn calls for a consideration of some provisions of the Children's Act 38 of 2005.

## 2.2 Forms of *Ukuthwala*

It is generally accepted that the traditional custom of

*ukuthwala* is often carried out with the knowledge and consent of the girl or her guardian. This obviously suggests that *ukuthwala* is not necessarily effected against her will, or that of her guardian.<sup>29</sup> In the past, courts have held that *ukuthwala* should not be used as a cloak for forcing unwelcome attentions on a patently unwilling girl;<sup>30</sup> they have also held that abduction by way of *ukuthwala* is unlawful.<sup>31</sup> On the other hand, courts have suggested that if there is a belief by the abductor that the custom is lawful and that the parents or guardians consented to the taking, it would not be abduction because abduction is a crime against parental authority.<sup>32</sup>

We briefly look in this section at what we propose to be three forms of *ukuthwala*.<sup>33</sup> First, the practice that occurs where a girl is aware of the intended abduction and there is collusion between the parties,<sup>34</sup> i.e. where the girl or woman being abducted conspires with her suitor. The 'force' used in the act of abduction is therefore for the sake of performance only. For that reason, *ukuthwala* in this model could be suggested to be equivalent to elopement.<sup>35</sup> In this type of *ukuthwala*, the girl gives her consent.<sup>36</sup> The issue of consent is additionally important because, as observed earlier, *ukuthwala* is a preliminary procedure to a customary marriage and not a marriage in itself. The consent to *ukuthwala* presumably carries through the negotiations, to provide the basis for the validity of the (customary) marriage which is eventually concluded. If after the *ukuthwala* has taken place, the girl's parents refuse to give their consent, there cannot be a valid ensuing customary marriage.<sup>37</sup>

Second, *ukuthwala* also takes the form of where families would agree on the union, but the girl is unaware of such an agreement.<sup>38</sup> It has been observed that this type of *ukuthwala* often happened in cases where the girl

<sup>26</sup> Koyana and Bekker (n 19 above) 141.

<sup>27</sup> F Mdumbe 'International and domestic legal frameworks impacting on *Ukuthwala*' presented at the SA Law Reform Commission Roundtable on the practice of *Ukuthwala*, 30 November 2009.

<sup>28</sup> It should be observed that before the Recognition of Customary Marriages Act, 1998, consent of the girl's father was essential to the validity of the customary marriage. It is, moreover, argued that this requirement may still be necessary because section 3 (b) of the Recognition of Customary Marriages Act provides that 'the marriage must be negotiated ... in accordance with customary law.' Unless the last phrase is read as referring only to ceremonial aspects of customary law, and the payment of *lobola*, the requirement of parental consent (as at customary law) is also requirement for a valid customary marriage under the Act. See further note 37 below.

<sup>29</sup> Curran and Bonthuys (n 22 above) 615.

<sup>30</sup> *Nkupeni v Numunguny* 1938 NAC (C &O) 77.

<sup>31</sup> *R v Swartbooi* 1916 EDL 170; *R v Sita* 1954 4 SA 20 (E).

<sup>32</sup> *R v Sita* (n31 above).

<sup>33</sup> Bekker, Rautenbach and Goolam (n 18 above), 31.

<sup>34</sup> *LAWSA Indigenous Law* Vol 32, 2009, para 89.

<sup>35</sup> *LAWSA* (n 32 above), para 89.

<sup>36</sup> M Herbst and W Du Plessis 'Customary law v Common law: A hybrid Approach in South Africa' (2008) 12 *Electronic Journal of Comparative Law* 6.

<sup>37</sup> The 1998 Recognition of Customary Marriages does not make provision for *ukuthwala*. It has, however, put beyond doubt the necessity for the consent of the bride to a customary marriage. In terms of section 3(1) of the Recognition of Customary Marriages Act, the consent of both spouses is necessary for the validity of a customary marriage. (The consent of the guardian is discussed in note 28 above).

<sup>38</sup> Bekker, Rautenbach and Goolam (n 18 above), 31.

might not otherwise agree to her parent's choice. It also happens in situations where a girl happens to be of high rank but, for various reasons, attracts no suitors.<sup>39</sup> After the girl has been *thwala'd* and both families' desire and consent to the union established, the girl is watched until she gets used to the idea of the marriage.<sup>40</sup> Consent, understood in western terms, might be more difficult to argue here.

The third version is where the custom occurs against the will of the bride. Under this form, a girl is taken to the family home of the young man by force. Emissaries are then sent to her family to open marriage negotiations. The family of the girl may refuse negotiations in which case a beast is payable<sup>41</sup> and the girl is taken back to her family. In this form of *ukuthwala*, there is no initial consent from either the girl or her parents or guardian. In addition, in its most abusive form, the forced abduction can expose the girl to rape by her 'husband' and to actual or threatened violence in order to keep her in the relationship.<sup>42</sup> In this form of *ukuthwala*, we see that the bride is unwilling and therefore the intended marriage would, arguably, be a forced marriage. Other human rights violations are obvious, including the infringement of freedom and security of the person, violation of bodily integrity, dignity and various provisions which prohibit forms of slavery, to name a few.

As a general proposition, it can be concluded that some forms of *ukuthwala* do violate women and children's rights. At the same time, there are also some legitimate cultural goals which come with the practice and which arguably do not overstep the mark. How to address the objectionable forms of the practice of *ukuthwala*, therefore provides a suitable vehicle for pursuing the debate on whether criminalisation, or enacting an absolute prohibition of discriminatory customary laws, is the desirable path to follow. On the one hand, there is the abiding interest in improving the position of women and children affected by traditional customary practices which can be harmful or detrimental, by proscribing them altogether; however, on the other hand, for many supporters of *ukuthwala*, the practice serves to promote legitimate cultural goals, at least one of which is to force

the father of the girl to start marriage negotiations. For this group, criminalisation or prohibition would abrogate a cultural practice with considerable legitimacy, and impair the right to culture.

### 3. Contextualising *ukuthwala* within the constitutional and international human rights paradigms

From the above discussion, several conclusions with constitutional implications can be drawn from the practice of *ukuthwala*. First, it is clear that the practice of *ukuthwala* only subjects unmarried women and girls, and not unmarried men and boys, to it. As a customary practice applicable to only girls, gender equality is called into play. Second, the discussion has also shown that with some forms of *ukuthwala*, girls are *thwala'd* without their consent. This violates their bodily integrity and freedom and security of the person. Third, the reported incidents of the current practice of *ukuthwala* show that the practice has taken the form of a 'forced marriage' and is no longer merely a preliminary process undertaken in the lead up to a customary marriage. Fourth, we see that current trends related to *ukuthwala*, may lead to 'child marriages'. Fifth, reports show that *ukuthwala* is proving to be a serious contributing factor leading to violence against women and children.

#### 3.1 *Ukuthwala* and the right to equality

Both the South African Constitution, in section 9, as well as international human rights standards prohibit discrimination based on sex and recognise equality of both sexes.<sup>43</sup> The significance of this principle where women's rights are concerned cannot be over-emphasised. Indeed, as Cook points out<sup>44</sup> in the international sphere at more or less the same time as the South African constitution was adopted:

The reasons for this general failure to enforce women's rights are complex and vary from country to country. They include lack of understanding of the systemic nature of the subordination of women, failure to recognise

<sup>39</sup> Bennett (n 17 above) 212.

<sup>40</sup> K Woods 'Contextualizing group rape in South Africa' (2005) 7 *Culture, Health and Sexuality* 303 at 313.

<sup>41</sup> LAWSA (note 32 above) para 89; Bekker (n 9 above) 98.

<sup>42</sup> Curran and Bonthuys (n 22 above) 616.

<sup>43</sup> Article 1 of the UN Charter; Article 2 of UDHR; Article 2 of CESC; Article 2 (1) of the CCPR; Article 2 of CEDAW and Article 2 and 3 of the ACHPR.

<sup>44</sup> R J Cook 'Women's International Human Rights Law: The Way Forward' in R J Cook (ed) *Human Rights of Women: National and International Perspectives* (1994) 3 at 3.

<sup>45</sup> Cook (n 44 as above). See, for example, Art.18 of the African Charter on Human and People's Rights; Art.1 of CEDAW; and Art.24 (3) of the Convention on the Rights of the Child.

the need to characterise the subordination as a human rights violation, and lack of state practice to condemn discrimination against women.

To this end, she observes that the legal obligation to eliminate all forms of discrimination against women is a fundamental tenet of international human rights law.<sup>45</sup>

In South Africa, the Constitutional Court has consistently affirmed the fact that the principle of equality and non-discrimination is recognized, and its value conceded even in the contest of competing claims of the right to equality and the right to culture. In the *Bhe* case,<sup>46</sup> for example, Langa, DCJ noted that:

The rights to equality ... are of the most valuable of rights in an open and democratic state. They assume special importance in South Africa because of our past history of inequality and hurtful discrimination on grounds that include race and gender.

At the point of entering into a marriage, several international human rights standards require that there should be equality of both spouses. For example, article 16 (1) of the Universal Declaration on Human Rights, 1948 (UDHR) provides that ... 'Men and women of full age ... have the right to marry and found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.' In article 16 (2) UDHR, 'Marriage shall be entered into only with the free and full consent of the intending parties'. In addition to the UDHR, article 1 of the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 1964 provides that 'No marriage shall be legally entered into without the full and free consent of both parties ... '

Furthermore, article 16 of CEDAW provides:

States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

- (a) The same right to enter into marriage;
- (b) The same right freely to choose a spouse

and to enter into marriage only with their free and full consent.

CEDAW is fully applicable to girls under 18 years of age. Article 16(2) of CEDAW provides that the betrothal and marriage of a child shall have no legal effect and that all necessary action, including legislative action, shall be taken by States to specify a minimum age of marriage, and to make registration of marriage in an official registry compulsory. In addition, in 1994, a General Recommendation on Equality and Family Relations, the Committee on CEDAW recommended that the minimum age for marriage for both boys and girls should be 18.

At the regional level, the African Charter on the Rights and Welfare of the Child (ACRWC)<sup>47</sup> sets the framework to eliminate gender discriminatory practices. The ACRWC prohibits discrimination of children in any form and guarantees all children to enjoy the rights and freedoms recognised in the ACRWC 'irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex ... birth or other status. Member states to the ACRWC have the obligation to adopt legislative or other measures as may be necessary to give effect to the provisions of the Charter.<sup>48</sup>

Further, the ACRWC defines a child as 'every human being below the age of 18 years'.<sup>49</sup> This definition highlights the significance of addressing discrimination in African societies in a number of ways.<sup>50</sup> First, according to this definition, ACRWC applies to every child under the age of eighteen in ratifying countries, irrespective of sex. Secondly, the ACRWC unequivocally prohibits child marriages of both boys and girls under the age of 18. To that end, Mezmur has observed that the ACRWC provide greater protection than the Convention on the Rights of the Child, and avoids any discrepancy between the minimum age of marriage for both boys and girls, which is consistently lower for girls in many countries.<sup>51</sup> Furthermore, the ACRWC is unequivocal with regard to the relationship between culture and children's rights. It explicitly asserts its supremacy over any custom, tradition, cultural or religious practice inconsistent with the rights and obligations guaranteed under it.<sup>52</sup>

<sup>46</sup> *Bhe and others v Magistrate Khayelitsha* (Commissioner for Gender Equality as *Amicus Curiae*) 2005(1) BCLR 1 (CC); 2005 (1) SA 580 (CC)

<sup>47</sup> South Africa became a party to the ACRWC on 7 January 2000.

<sup>48</sup> Article 1 (1) of the Charter.

<sup>49</sup> Article 2 of the Charter.

<sup>50</sup> This significance is appreciated when the definition of a child under the Charter is contrasted with the definition of a child provided by the CRC. The CRC defines a child as 'every human being below the age of 18 years unless, under the laws applicable to the child, majority is attained earlier'. Marriage would typically result in majority status being attained.

<sup>51</sup> B Mezmur 'The African Children's Charter versus the UN Convention on the Rights of the Child: A zero-sum game?' (2008) 23 SAPR/PL, 20.

<sup>52</sup> Article 1(3) of the Charter.



Further protection of women and children affected by discriminatory practices in Africa is provided under the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (the Protocol).<sup>53</sup> The Protocol provides that states parties shall enact appropriate national legislative measures to guarantee, inter alia, free and full consent of both parties to a marriage.<sup>54</sup> The Protocol has also set the minimum age for both girls and boys contemplating a marriage at 18.<sup>55</sup>

From the above discussion, we see that the practice of *ukuthwala* has the strong potential to violate international human rights standards, especially where a forced marriage is the result of such practice. Equality norms make clear that men and women are to have equal rights at the point of entry into marriage. Some forms of *ukuthwala* are clearly in violation of this right. Moreover, the right to free and full consent to a marriage, as recognised in the international human rights standards, cannot be achieved when one of the parties involved is not sufficiently mature to make an informed decision. This position is applicable to cases of *ukuthwala* where, as reported, girls as young as 12 years are abducted. Furthermore, where consent is obtained through force, this is also a clear violation of the international standards that require that there should be free and full consent from both parties.

### 3.2 Right to culture

South Africa's constitution expressly recognizes the practice of one's culture, provided that persons exercising cultural rights may not do so in a manner that is inconsistent with any other provisions of the Bill of

Rights.<sup>56</sup> Based on the constitutional recognition of the right to culture, proponents of *ukuthwala* would argue that everyone, including, the state is prohibited from interfering with their right to practice *ukuthwala*. As argued by Bennett,<sup>57</sup> 'the recognition of culturally defined systems of law has become a constitutional right, vesting in groups and individuals, with the implication that the State has a duty to allow people to participate in the culture of their choice, including a duty to uphold the institutions on which that culture is based'. Devenish<sup>58</sup> has also argued that 'the right to practice one's culture allows members of communities to freely engage in the practice of their culture without intervention from the state or any other source'.

Sections 30 and 31 of the Constitution appear to be similar in wording to several international standards. An obvious example is article 27 of the UDHR.<sup>59</sup> Other examples of the recognition of the right to culture in international law are article 15 (1) (a) of the CESC, 27 of the CCPR and article 29 of the CRC. On the regional level, the rights to culture were first declared in article 17 of the African Charter on Human and Peoples' Rights.<sup>60</sup>

From the above discussion, we see that both international human rights law and the South African Constitution recognize the right to culture. This notwithstanding, cultural rights are not regarded as providing a basis on which other protections may be abridged.<sup>61</sup> Rather than protecting culture at the expense of human rights, international documents reveal that culture necessarily must cede to universal standards.<sup>62</sup> Indeed it is suggested that culture is protected so that it may enhance human rights development, and, in turn, not

<sup>53</sup> The Protocol, which entered into force on 25 November 2005, is the first specialized gender neutral instrument for the protection of women's rights in Africa. It was adopted by the Assembly of the Heads of State and Governments of the African Union (AU) at its second ordinary session, on 11th July 2003 in Maputo, Mozambique. It was promulgated out of concern by the AU that women in Africa continue to be victims of discrimination and harmful practices (see Preamble to the Protocol).

<sup>54</sup> Article 6 (a) of the Protocol.

<sup>55</sup> Article 6 (b) of the Protocol.

<sup>56</sup> Ss 30 and 31 of the Constitution of the Republic of South Africa, 1996.

<sup>57</sup> TW Bennett 'Conflict of laws' in Bekker, Rautenbach and Goolam (n 18 above) 18.

<sup>58</sup> G Devenish *A Commentary on the South African Bill of Rights* (1999) 421.

<sup>59</sup> Article 27 of the UDHR states that: 'Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits; Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.' The right to culture is also an integral part of other fundamental rights enunciated in the UDHR such as freedom from conscience, expression and religion

<sup>60</sup> South Africa ratified this treaty in July 1996.

<sup>61</sup> L Mwambene *The impact of the Bill of Rights on African customary family laws: A study of women's rights in Malawi with some reference to developments in South Africa* (2009) Unpublished LLD thesis, University of the Western Cape.

<sup>62</sup> R Cook 'State Accountability under the Convention on the Elimination of all Forms of Discrimination Against Women' in R Cook (ed) *Human Rights of Women: National and International Perspectives* (1994) 228 at 234-235.

<sup>63</sup> J Sloth-Nielsen and B Mezmur 'Surveying the research landscape to promote children's legal rights in an African context' 2007 *African Human Rights Law Journal*, 330, 335-336 observe that 'human rights documents continually recognise that culture is an area that must be protected. However, culture should be harnessed for the advancement of children's rights. But when it appears that children are disadvantaged or disproportionately burdened by cultural practice, the benefits of the cultural practice and the harm of the human rights violation must be weighed against each other. How to strike a necessary balance between culture and children's rights is an issue that should continue to engage the minds of scholars.'

lead to the derogation or diminution of rights.<sup>63</sup>

International treaty law exemplifies the approach that places the preservation of human rights as the most fundamental universal principle, even when human rights protections challenge cultural practices. Article 5 of CEDAW requires States Parties to take all appropriate measures to:

modify the social and cultural patterns of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority of either of the sexes or on stereotyped roles for men and women.<sup>64</sup>

The CRC also confronts the possibility of misuse of culture as a pretext to violate children's rights insofar as article 24 (3) provides that 'States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children'. Furthermore, the CRC clearly places a focus on the child's best interests,<sup>65</sup> the child's evolving capacities,<sup>66</sup> the principle of non-discrimination<sup>67</sup> and the respect for the child's evolving capacities<sup>68</sup> all of which recenter the focus of human rights on children and require placing children's interests before those of potentially abusive cultural practices.

The African Women's Protocol contains provisions relating to the elimination of harmful practices including the prohibition, through legislative measures backed by sanctions, of all forms of harmful cultural practices, including female genital mutilation.<sup>69</sup> Harmful practices have been regarded as receiving 'the most' attention in the Protocol.<sup>70</sup>

On the other hand, some scholars' approach, largely influenced by cultural relativism theory, conceives another version of addressing the conflict between culture and human rights. They argue that instead of abolishing customary laws that appear to be inimical to human rights, we should closely look at local cultures and see which aspects we can best use to achieve the aspirations

of human rights.<sup>71</sup> This approach would militate against the view that *ukuthwala* should be proscribed in its entirety.

Specifically addressing himself to this view, Ibhawoh states that:<sup>71</sup>

... it is not enough to identify the cultural barriers and limitations to modern domestic and international human rights standards. It is even more important to understand the social basis of these cultural traditions and how they may be adapted to or reintegrated with national legislation to promote human rights. Such adaptation and integration must be done in a way that does not compromise the cultural integrity of peoples. In this way, the legal and policy provisions of national human rights can derive their legitimacy not only from the state authority, but also from the force of cultural traditions.

These insights may be important to the analysis of the implications of the Children's Act for *ukuthwala* in South Africa. Thus, it may be necessary to distinguish between the practice of *ukuthwala* in forms which are inimical to human rights and may lead to human rights abuses, and those dimensions of the practice that advantage human rights, and promote the right to culture. In the light of the fact that the right to practice *ukuthwala* in South Africa continues to be asserted by people who are in opposition to change the custom, it may arguably be preferable to explore options which retain the positive features of the custom, rather than advocating an abolitionist/prohibitionist stance which denies any value in the customary version of *ukuthwala*.<sup>73</sup>

However, the idea of developing customary laws so that they are consistent with human rights comes into direct confrontation with debates about the protection of women and children against discrimination and their protection against violence. Whilst the development or adaptation of customary law is considered to be a viable

<sup>64</sup> See too article 2 of CEDAW, which requires: 'State Parties ... by all appropriate means and without delay ... (to) undertake: (f) .. appropriate measures, including legislation to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.'

<sup>65</sup> Articles 3, 9, 20, 21, and 40 of the CRC

<sup>66</sup> Articles 5, 12, 14 and 40 of the CRC

<sup>67</sup> Article 2 and the Preamble of the CRC.

<sup>68</sup> Articles 21, 28, 39, 40, and Preamble of the CRC.

<sup>69</sup> Article 5 of the Protocol.

<sup>70</sup> F Banda 'Building on a global movement: Violence against women in the African context' 2008(1) *African Human Rights Law Journal* 1 at 16.

<sup>71</sup> Nyamu-Musembi C 'Are local norms and practices fences or pathways? The example of women's property rights' 126 as cited by Banda (n ) 256.

<sup>72</sup> Ibhawoh B 'Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State' (2000) *Human Rights Quarterly* 838 at 839.

<sup>73</sup> At the discussion forum convened by the SA Law Reform Commission, most people were of the view that there was nothing wrong with *ukuthwala* as it was originally practiced and that, despite the recent distortions of the practice, the custom should not be outlawed.

approach to achieving international human rights aspirations because of the cultural legitimacy that achieves,<sup>74</sup> feminist scholars and children's rights advocates alike might question whether this can be done at all without sacrificing the protection of women and children on the altar of custom.<sup>75</sup> In the case of *Christian Education of South Africa v Minister of Education*,<sup>76</sup> the Constitutional Court affirmed that the rights of members of communities that associate on the basis of language, culture and religion cannot be used to shield practices which offend the Bill of Rights.<sup>77</sup> In this case, it was instructive to note that, for the discussion related to the practice of *ukuthwala*, children's rights to protection from violence trumped justificatory claims based on religion. By analogy, it could be predicted that courts may not uphold the practice of *ukuthwala* if it even has the mere potential for infringing other constitutional rights.

Fear of opening the door to trenchant violations of the physical security of South African women and children might blur and diminish arguments which advocate a more sensitive and nuanced treatment of the custom through which the positive aspects can be retained. We return to this in conclusion.

## 4. Exploring the impact of the Children's Act 38 of 2005 on *ukuthwala*?

### 4.1 Culture and religion in the Children's Act

The authors would assert that the Children's Act 38 of 2005 (hereafter the Act) is consciously sensitive to culture. Any number of provisions support this claim, including both direct and indirect references to the importance of culture in child rearing and legal approaches thereto. For instance, the 'best interest of the child' principle outlined in section 7 requires consideration to be had, where relevant, to the child's 'intellectual, emotional, social and cultural development' (section 7((1)(h))), and mentions the need for children to maintain a connection with (inter alia) 'the extended family, culture and tradition' (s 7(1)(f)(ii)) as a consideration conducing to the child's best interests

(emphasis inserted).

As far as placement of the child in alternative care is concerned, there are various provisions emphasizing the importance of culture. Foster care, for example, requires placement of a child after consideration of a report of a designated social worker about 'the cultural, religious and linguistic background of the child' (section 186(1)(a)), and this cultural matching is reinforced further by the permissive provision to place a child from a different cultural, religious and linguistic background with foster parents whose characteristic are different to that of the child '*but only if...* there is an existing bond between that person and the child' (section 186(2)(a)) or if no suitable person can with a similar background can be found available to provide foster care to the child (section 186(2)(b)). The Norms and Standards for Foster Care (Part 11(6)(g) require foster care services, supervision and arrangements around such supervision to 'be sensitive to the religious, cultural and linguistic background of the child'.

In the assessment of the suitability of a prospective adoptive parent, the social workers effecting the assessment 'may take the cultural and community diversity of the adoptable child and the prospective adoptive parent into consideration' (section 231(3), and the Regulations to the Act affirm that in an inter-country adoption process, the report on the would-be adoptive parents must include information on the applicant's ethnic, religious and cultural background (regulation 111(e)).

Additionally, culturally appropriate values and principles surface periodically throughout the Children's Act: the legislative provision (in section 16) for the responsibilities of children, as provided for article 31 of the African Charter on the Rights and Welfare of the Child,<sup>78</sup> is a case in point.

In addition to the positive way in which culture emerges as a general consideration in the Children's Act, culture and social practice derived therefrom form the

<sup>74</sup> AA An-Naim 'State Responsibility under the International Human Rights Law to change Religious and Customary Laws' in Cook RJ *Human rights of women: National and International Perspectives* (1994) 167 at 173-175 argues that unless international human rights have sufficient legitimacy within particular cultures and traditions, their implementation will be thwarted, particularly at the domestic level, but also at the regional and international levels. Without such legitimacy, it will be nearly impossible to improve the status of women through the law or other agents of social change.

<sup>75</sup> Grant E 'Human rights, cultural diversity and customary law in South Africa' (2006) *Journal of African Law* 2 reflects on the difficulties of legal pluralism in relation to the Bhe case: 'As the judgment shows, on one level, reconciling equality and culture is simply a matter of identifying those aspects of customary laws which offend the constitutional guarantee of equality, and striking them down. On the other level, it required the striking down of the male primogeniture rule in customary laws as incompatible with the right to gender equality. What to put in its place is far more complicated matter. It is complicated not merely because of practical problems which preoccupied the majority of the court in Bhe case, but because of potentially contradictory demands of equality and the maintenance of legal dualism'.

<sup>76</sup> *Christian Education of South Africa v Minister of Education* 2000 4 SA 757 (SCA) 711 para 26.

<sup>77</sup> See also T Maseko 'The Constitutionality of the State's intervention with the practice of male traditional circumcision in South Africa' (2008) *Obiter* 192.

<sup>78</sup> See J Sloth-Nielsen and B Mezum, 'A Dutiful Child: The Implications of Article 31 of the African Children's Charter' 2008 (52) *Journal of African Law* 159.



basis of a dedicated section of the Act, namely section 12 (titled 'Social, cultural and religious practices'). The section regulates in detail two customary practices, namely male circumcision (section 12(8)-(10) and virginity testing (section 12(4)-(7)).<sup>79</sup> Female genital mutilation is also prohibited (section 12(3)).

*Ukuthwala*, it is worth noting at the outset, is not mentioned by name as a customary practice in this section, a fact which might become relevant were the effects of the Act upon the practice to be considered. It might, for instance, be inferred that the legislature knew about the social practice as evidenced by prior writing<sup>80</sup> and research on the practice, and, by choosing not to refer to *ukuthwala*, signaled that the custom did not require regulation. An *a priori* stance that the practice had no constitutional ramifications and did not necessitate legislative intervention could therefore be argued.

This does not mean that *ukuthwala* is in any way immune from future legal scrutiny. And, we suggest that should the constitutional or legislative validity of the practice be put in issue, it is possible that the impact of the remainder of section 12's provisions upon *ukuthwala* as a customary practice might be called into question, insofar as the practice has a bearing upon the girl child.

#### 4.2 Section 12(1) and the overarching prohibition on detrimental cultural practices

Section 12(1) contains the overarching right of every child 'not to be subjected to social, cultural and religious practices which are detrimental to his or her wellbeing'. This section, cast as a right of the child, is not hit by the offences created by section 305 (the overarching penalties clause of the Act). Hence, were *ukuthwala* to be characterized as a social practice which either in general or in a specific situation violated section 12(1) as a practice 'detrimental to the child's wellbeing', the remedy would not lie automatically lie in the penal sphere (as far as contravening the Children's Act is concerned: there may well be criminal sanctions derived from other common law or statutory offences, however). The potential for delictual damages remains for any infringement of rights under this section, though, as do other potential remedies for

infringements such as injunctions, declaratory orders and interdicts, or preventive measures.

The debate about whether *ukuthwala* contravenes section 12(1) in any event (in the absence of any concrete sanction being attached) requires an assessment as to whether the practice is in fact a social and cultural practice which is detrimental to the child's wellbeing'. Our answer to this must be context dependent: the abduction and rape of a child without her consent falls undeniably to be outlawed as a harmful cultural practice, albeit that the sanctions of conventional criminal law might also be brought to bear. However, equally, we are convinced that not all forms of *ukuthwala* can be labeled as objectionable, harmful or detrimental, as outlined above in previous sections of this article. Any consideration of the implications of s 12 is speculative, as the determination as to whether the practice is detrimental will inevitably be related to the actual circumstances which are laid before the court for adjudication.

#### 4.3 Section 12(2)(a) and early marriage

Section 12(2) (a) of the Children's Act is potentially of direct relevance to determining the legal status of *ukuthwala*. In fact, in ordinary parlance, this section would probably be described as the 'forced marriage' prohibition of the Act (as is required by the African Children's Charter, amongst other human rights documents).<sup>81</sup>

The first part, 12(2)(a), prohibits the 'giving out' in either marriage or engagement 'of a child below the minimum age set by law for a valid marriage'. Several comments may arise here: 'giving out' (seemingly an old fashioned terminological rendering of the marriage pact between families) limits the usefulness of this article in accommodating some versions of *ukuthwala* insofar as the child 'victim' is concerned: a child who is *thwala'd*, as described above, is definitely not in any conventional sense of the word 'given', let alone 'given out'. In fact, a more suitable English rendition would be achieved by the substitution of 'given' with 'taken'!

A tentative conclusion is that this prohibition was not drafted to target *ukuthwala* as conventionally understood. It seems primarily to target early marriage, and the family-

<sup>79</sup> See section 12(4), (5), (6) and (7) in respect of virginity testing, and section 12(8),(9) and (10) in respect of male circumcision. Regulations 3-6 elaborate these provisions further. A detailed consideration is beyond the scope of this article. Suffice it to mention that the provisions on virginity testing were particularly contested during Parliamentary hearings, and led to a compromise provision which sees prohibition in place for the practice where the child to be subjected to the practice is below the age of 16 years, accompanied by the enactment of regulations prescribing how virginity testing is to be performed to comply with the Act where the child is over 16 years and furnishes her consent. One of the authors of this article was a member of the team which drafted the Regulations submitted to the Department of Social Development outlining the further requirements for the practice to be conducted in conformity with the Act.

<sup>80</sup> See, for instance, the prior work of Koyana and Bekker (note 19 above); Bennett (note 17 above).

<sup>81</sup> Article 21(2) of the African Charter on the Rights and Welfare of the Child prohibiting both child marriage and betrothal.

to-family negotiations that may precede it.

Second, there are obvious and intractable difficulties occasioned by the phrase 'of a child below the minimum age set by law for a valid marriage' in section 12(2)(a). Not the least of these problems relates to the variety of minima set by law for valid marriages under different legal regimes in South Africa.<sup>82</sup> Mention has been made of the minimum set for the recognition of a valid customary marriage – 18 years – in terms of the Recognition of Customary Marriages Act.<sup>83</sup> But is the minimum 'set by law' also a minimum under 'unwritten' customary law which has also been recognized as 'law' for the some purposes?<sup>84</sup> Assuming a much lower age as the minimum under most customary systems – eg around the age of puberty or shortly thereafter – this provision could potentially be of little practical effect in the protection of children against early marriage (an explicit requirement of the African Children's Charter as well as a number of other instruments relevant to South Africa).

However, such an interpretation would render the provision practically devoid of value, and would also raise questions about the value of the Recognition of Customary Marriages Act on setting a minimum age of 18 at all. Further, applying unwritten customary ages of marriage would run counter to the overall legislative intent that the Children's Act apply to all children below the age of 18 years (section 17). It is suggested, therefore, that the 'law' setting a minimum age of marriage referred to in section 12(1)(a) must refer to statutory law.

This does not assist in resolving the additional problem that the Marriage Act of 1961 nevertheless continues to contain a lower minimum age of marriage than 18 years, descending to 15 years or even lower with Ministerial consent,<sup>85</sup> and moreover is one that discriminates between boys and girls as regards the statutory minima set.<sup>86</sup>

As 'pure' civil law, this Act might not, it is submitted, be of any relevance to explicating the legal status of *ukuthwala* as a customary practice. Nevertheless, in establishing the benchmark criterion of 15 years for girls as the minimum age for marriage, it would be difficult to argue that **in law**, any offensive practice regarding engagement, promise of marriage or marriage itself is restricted solely to persons above the age of 18 years,

when the Marriage Act itself so plainly provides otherwise. It follows, therefore, that *ukuthwala* (when it is deployed consensually as a prelude to marriage in the case of girls below the age of 18 years) can hardly be regarded as being *contra bonos mores* when the legal marriage of girls of that age is permissible under the law of the land.<sup>87</sup>

#### 4.4 Section 12(2)(b) and forced marriage

Section 12(2)(b) of the Act prohibits that a child 'above that minimum age be given out in marriage or in engagement without her consent.' It remains to discuss whether section 12(2)(b) is useful as a shield against other forms of *ukuthwala* (forced seduction, for want of a better description), and if so how? Section 12(2)(b) can be distinguished from section 12(2)(a) in that it refers, first, only to persons above the minimum age of marriage (as already discussed, i.e. 15 years of age for girls), and secondly, to their being given out in marriage or engagement *without their consent*. This accords more logically with the expectation of a prohibition on *forced marriage*, where the focus is also on absence of consent or upon duress.

Section 12(2)(b) apparently therefore includes *ukuthwala* within its ambit where the abduction is performed without consent; however, the caveat is whether *ukuthwala* can be brought within the legislative words 'marriage or engagement' – seduction is not mentioned, nor is it axiomatic that 'seduction with the view to an eventual marriage' bears an equivalent meaning – and, as important, whether the words 'given out' in section 12(2)(b) can be given a clear and precise meaning.

To be blunt, can the 'seducer', or abductor, in the way that *ukuthwala* has been described to take place, be subsumed under the prohibition on 'giving out' a child in marriage without her consent? This seems to strain the ordinary meaning of the words unduly, as the mischief targeted appears rather to be the act of *offering* the girl for marriage without her consent, and the wrongdoer likely to be a parent or family member, rather than the seducer or abductor. If this interpretation is correct, then *ukuthwala* does not fall foul of the section 12(2)(b) prohibition. It is simply inapplicable to the practice.

<sup>82</sup> Which in turn raises the potentially (indirectly) discriminatory application of this provision, since questions might arise as to which children are protected by which set of laws setting minima.

<sup>83</sup> Act 120 of 1998.

<sup>84</sup> See the discussion of South African 'law' as including customary law in LAWSA (n 34 above).

<sup>85</sup> As low as 12 years for girls and 14 years for boys, linked to the presumed age of puberty.

<sup>86</sup> P Mahery and P Proudlock 'Legal ages in South African Law 2010', Children's Institute, University of Cape Town.

<sup>87</sup> The argument that section 12(2)(a) refers to the minimum age for marriage set in the Marriage Act is reinforced if regard is had to the provisions of section 12(2)(b) which refers to protections for persons **above** the minimum age of marriage. Since the Act as a whole applies to persons below the age of 18 only, 'persons above the age of marriage' referred to in section 12(2)(b) must mean some other age, i.e. one below the age of 18 years.

On the other hand, it is possible to conceive that the acts of a girl's parents, were they to be complicit in making arrangements with the abductor, without the girl's consent, would render their participation in *ukuthwala* conduct which falls foul of section 12(2)(b). In this regard, it is worth pointing out that section 12(2) is explicitly subject to the penal sanctions of the Children's Act contained in section 305.

The question which then arises is whether section 305, read with section 12(2), renders *ukuthwala* subject to criminal sanction? The preliminary answer to this, based on the analysis above, is no (or not really?).

On the wording of both section 12(2)(a) and (b), the infringement of rights is committed by whomever 'give the child out' in marriage or engagement. That is the first hurdle. The abductor's conduct cannot be brought within the plain meaning of these words. Second, the difficulties with the internal conflict of laws relating to the minimum age of marriage, and the requirement of a guardian's consent to validate a customary marriage<sup>88</sup> might prove a fatal defence to any prosecution: which law, one might ask? And what of the *nulla poena sine lege* principle, which at minimum requires certainty as to the conduct to be deemed offensive?

Third, unless *ukuthwala* can be characterised as marriage – which it is not, it is a prelude to marriage negotiations – or engagement – which seems to be stretching a civil/canonical law concept way beyond the common meaning, it is not a practice which is covered by the prohibition at all. It is submitted that the entry into marriage negotiations expected in customary law, and embodied in the practice of *ukuthwala* is not the same as the concept of 'engagement' of civil law.<sup>89</sup>

At first blush, section 12(2)(b) does seem to embody a forced marriage prohibition. But it is directed at only parents or guardians who furnish their consent in circumstances where that of the child is lacking, or where they apply duress. It may well be, therefore, that this conception of forced marriage is in need of better elaboration, and related more specifically to the South African cultural context, in the same way as has recently come to pass in the United Kingdom.<sup>90</sup>

Two remaining points require consideration in the context of the Children's Act 38 of 2005, before the

discussion concludes with the consideration of *ukuthwala* as a customary practice with legal dimensions under current South African law.

The first question that may be posed is whether other provisions of the Children's Act may be adduced to condemn or to outlaw the practice. The answer to this is necessarily speculative, and rests largely on the approach to section 305(3) which criminalises parental child abuse, read with the various provisions which underscore the child protection system (including section 150 which defines a child in need of care and protection). Again, the abductor is potentially not liable under this approach, which focuses on the part played by parents and guardians.

Alternatively, recourse might be had to the offences contained in the Criminal Law (Sexual Offences) Amendment Act of 2007, or to common law renditions of kidnapping or abduction. When measured against the array of options for the assimilation, accommodation and development of customary law, these latter alternatives can only be considered as blunt swords indeed by which to address the nuances of custom and tradition under a constitutional dispensation.

Finally, some consideration must be given to the option of civil liability. Assuming that it is correct that *ukuthwala* does not fall neatly under the provisions of section 12(2), an infringement of the child's rights to wellbeing contained in section 12 (1) might conceivably lay the basis for such a claim against the abductor/seducer. This is reinforced by the conceptualization of custom of *ukuthwala* as a delictual claim in **customary law itself**.

This might seem like an alarming proposition – along the lines of sanctioning the payment of damages for rape. It might, too, be regarded as perpetuating extreme gender inequality and offensive stereotypes which achieve no good in modern day South Africa (characterised by one of the most violent societies in the world as far as gender based violence and rape is concerned).

However, it does present the possibility of a more benign accommodation of this particular customary practice, in line with the desired objectives of current constitutional jurisprudence. And, as demonstrated above, the Children's Act itself is far from a model of clear condemnation of *ukuthwala* as a form of forced marriage.

<sup>88</sup> Under customary law, the consent of the father was a *sine qua non*, regardless of the age of the girl. Tacit consent can be inferred from the circumstances. Should the father, for example, accept *lobolo* or allow the couple to live together as man and wife, consent can be inferred.

<sup>89</sup> Arranged marriages are not mentioned by name; there also the question of consent can be problematised when severe pressure is brought to bear on a would-be child bride, often over a period of time, and she ultimately does in fact furnish consent, but for fear of prejudicing family relationships (for instance).

<sup>90</sup> See the UK Forced Marriage (Civil Protection) Act 2007 and the Multi-Agency Practice Guidelines Handling Cases of Forced Marriage of June 2009 issued by the Forced Marriage Unit of the Ministry of Justice; see further H Patel and A Guha 'Forced Marriage' in *Journal of Family Law and Practice* vol 1.1 (May 2010).

## 5. Conclusion

Forced marriage fails the constitutional compatibility test on any number of grounds, including freedom and security of the person (s 12 of the constitution), dignity rights (s 9), and the best interests of the child (s 28(2)). Similarly, the précis of the practices of *ukuthwala* provided in section 2 of this article would in the minds of most at least prima facie contravene essential constitutional requirements. However, *ukuthwala* is not, in plain sense of the word, 'forced marriage', although it could lead to this if the negotiations are concluded without the consent of the girl.

Further, though, we have argued that *ukuthwala* cannot be treated as a unitary phenomenon; variants of the practice must be distinguished. In attempting to rescue or divide positive attributes of *ukuthwala* which do not prima facie offend human rights, we suggest that current legal terminology, such as that used in the Children's Act, is not sufficiently nuanced to describe and regulate it. An example relates to the inclusion of the words 'giving out' in sections 12(2)(a) and (b), which confine the application of this section unduly.

Sensitivity to various ways in which customary law can be accommodated would lead to a conclusion that South

African law should recognise those forms of *ukuthwala* where the requirement of consent of the 'bride' is met, and she colludes or is aware of the mock abduction. The legal relevance of her participation in these acceptable forms of *ukuthwala* should be acknowledged. Child participation, and recognition of the evolving capacities of the child are a basic tenet of the Children's Act, and recognising the role of the girl as an actor in her own interests via *ukuthwala* thus promotes a fundamental principle of the Act. The benign accommodation approach promotes the positive aspects of culture, and moreover emphasises children's agency. (It is conceded, however, that the 'straight 18' position of the African Children's Charter in relation to child marriage does pose a significant barrier to advocating this position).

It would further be required that the common law offence of abduction also be developed to permit forms of mock abduction which are legal in customary law and in which consent to being 'carried away' features. However, where consent is absent and the abduction becomes unlawful, we suggest that existing criminal offences are adequate to cover the practice. There is therefore no need for additional legislative intervention in the criminal law sphere.